



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R01-OAR-2012-0113; A-1-FRL-9903-21-Region 1]

**Approval and Promulgation of Air Quality Implementation Plans; New Hampshire;
Transportation Conformity and Conformity of General Federal Actions**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. This revision establishes transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control measures and mitigation measures. In addition, the revision relies on the Federal rule for General Conformity. The intended effect of this action is to approve State criteria and procedures to govern conformity determinations. This action is being taken in accordance with the Clean Air Act.

DATES: This direct final rule is effective **[Insert date 60 days from date of publication in the Federal Register]**, unless EPA receives adverse comments by **[Insert date 30 days from date of publication in the Federal Register]**. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the Federal Register informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R01-OAR-2012-0113 by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.

2. E-mail: arnold.anne@epa.gov.
3. Fax: (617) 918-0047.
4. Mail: "Docket Identification Number EPA-R01-OAR-2012-0113," Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square - Suite 100, (Mail code OEP05-2), Boston, MA 02109 - 3912.
5. Hand Delivery or Courier. Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square - Suite 100, (Mail code OEP05-2), Boston, MA 02109 - 3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R01-OAR-2012-0113. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through www.regulations.gov, or e-mail, information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment,

EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square - Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

In addition, copies of the state submittal are also available for public inspection during normal business hours, by appointment at the State Air Agency: Air Resources Division, Department of Environmental Services, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095.

FOR FURTHER INFORMATION CONTACT: Donald O. Cooke, Air Quality Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square - Suite 100, (Mail code OEP05-2), Boston, MA 02109 - 3912, telephone number (617) 918-1668, fax number (617) 918-0668, email cooke.donald@epa.gov .

SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. Background and Purpose

- A. What Is Transportation Conformity?
- B. What is General Conformity?
- C. Call to States for Conformity SIP Revisions
- D. Transportation Conformity Provisions of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)
- E. General Conformity Affected by SAFETEA-LU
- F. Prior New Hampshire Conformity SIP Revision Action
- G. State Submittal and EPA Evaluation

II. Final Action

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I. Background and Purpose

The intent of the conformity requirements is to prevent the air quality impacts of Federal actions from causing or contributing to a violation of the national ambient air quality standards (NAAQS) or interfering with the purpose of a State Implementation Plan (SIP), Tribal Implementation Plan (TIP) or Federal Implementation Plan (FIP).

A. What Is Transportation Conformity?

Transportation conformity is required under Section 176(c) of the Clean Air Act to ensure that Federally supported highway, transit projects, and other activities are consistent with (“conform to”) the purpose of the SIP. Conformity currently applies to areas that are designated nonattainment, and those redesignated to attainment after 1990 (maintenance areas) with plans

developed under section 175A of the Clean Air Act, for the following transportation related criteria pollutants: ozone, particulate matter (PM_{2.5} and PM₁₀), carbon monoxide (CO), and nitrogen dioxide (NO₂). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards. The transportation conformity regulation is found in 40 CFR part 93, subpart A and provisions related to conformity SIPs are found in 40 CFR 51.390.

B. What is General Conformity?

General Conformity is a requirement of section 176(c) of the Clean Air Act (CAA) Amendments of 1990. General Conformity is a safeguard that no action by the Federal government interferes with a SIP's protection of the NAAQS. Under General Conformity, any action by the Federal government cannot: cause or contribute to any new violation of any standard in any area; interfere with provisions in the applicable SIP for maintenance of any standard; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard, any required interim emission reductions, or any other milestones, in any area. The general conformity regulation is found in 40 CFR part 93, subpart B and provisions related to conformity SIPs are found in 40 CFR 51.851.

C. Call to States for Conformity SIP Revisions

In the CAA, Congress recognized that actions taken by Federal agencies could affect a State, Tribal, or local agency's ability to attain and maintain the NAAQS. Congress added section 176(c) (42 U.S.C. 7506) to the CAA to ensure Federal agencies proposed actions conform to the applicable SIP, TIP or FIP for attaining and maintaining the NAAQS. That section requires Federal entities to find that the emissions from the Federal action will conform

with the purposes of the SIP, TIP or FIP or not otherwise interfere with the State's or Tribe's ability to attain and maintain the NAAQS.

The CAA Amendments of 1990 clarified and strengthened the provisions in section 176(c). Because certain provisions of section 176(c) apply only to highway and mass transit funding and approvals actions, EPA published two set of regulations to implement section 176(c). The Transportation Conformity Regulations, (40 CFR 51, Subpart T, and 40 CFR 93, Subpart A) first published on November 24, 1993 (58 FR 62188), address Federal actions related to highway and mass transit funding and approval actions. The General Conformity Regulations, (40 CFR 51, Subpart W, and 40 CFR 93, Subpart B) published on November 30, 1993 (58 FR 63214), cover all other Federal actions. These two conformity regulations have been revised numerous times.

When promulgated in 1993, the Federal transportation conformity rule at 40 CFR §51.395 mandated that the transportation conformity SIP revision incorporate several provisions of the rule¹ in verbatim form, except in so far as needed to give effect to a stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in these sections. Similarly, 40 CFR §51.851 required the State's general conformity provisions must contain criteria and procedures that are no less stringent than the Federal general conformity regulation, however the State could establish more stringent general conformity criteria and procedures if they apply equally to non-Federal, as well as Federal, entities.

D. Transportation Conformity Provisions of Safe, Accountable, Flexible, Efficient

¹ Specifically, those sections are: §§51.392, 51.394, 51.398, 51.400, 51.404, 51.410, 51.412, 51.414, 51.416, 51.418, 51.420, 51.422, 51.424, 51.426, 51.428, 51.430, 51.432, 51.434, 51.436, 51.438, 51.440, 51.442, 51.444, 51.446, 51.448, 51.450, 51.460, and 51.462.

Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

On August 10, 2005, the SAFETEA-LU was signed into law streamlining the requirements for conformity SIPs. Prior to SAFETEA-LU being signed into law, states were required to address all of the Federal conformity rule's provisions in their conformity SIPs. Most of the sections of the Federal rule were required to be copied verbatim from the Federal rule into a state's SIP, as previously required under 40 CFR 51.390(d).

Under SAFETEA-LU, states are required to address and tailor only three sections of the conformity rule in their conformity SIPs. These three sections of the Federal rule which must meet a state's individual circumstances are: 40 CFR 93.105, which addresses consultation procedures; 40 CFR 93.122(a)(4)(ii), which requires that written commitments be obtained for control measures that are not included in a Metropolitan Planning Organization's transportation plan and transportation improvement program prior to a conformity determination, and that such commitments be fulfilled; and, 40 CFR 93.125(c) which requires that written commitments be obtained for mitigation measures prior to a project level conformity determination, and that project sponsors must comply with such commitments. In general, states are no longer required to submit conformity SIP revisions that address the other sections of the conformity rule. This provision took effect on August 10, 2005, when SAFETEA-LU was signed into law.

E. General Conformity Affected by SAFETEA-LU

On April 5, 2010, EPA revisited the Federal General Conformity Requirements Rule to clarify the conformity process, authorize innovative and flexible compliance approaches, remove outdated or unnecessary requirements, reduce the paperwork burden, provide transition tools for implementing new standards, address issues raised by Federal agencies affected by the rules, and provide a better explanation of conformity regulations and policies. EPA's April 2010 revised

rule simplified state SIP requirements for general conformity, eliminating duplicative general conformity provisions codified at 40 CFR part 93, Subpart B and 40 CFR part 51, Subpart W. Finally, the April 2010 revision updated the Federal General Conformity Requirements Rule to reflect changes to governing laws passed by Congress since EPA's 1993 rule. The SAFETEA-LU passed by Congress in 1995 contains a provision eliminating the CAA requirement for states to adopt general conformity SIPs. As a result of SAFETEA-LU, EPA's April 2010 General Conformity rule eliminated the Federal regulatory requirement for states to adopt and submit general conformity SIPs, instead making submission of a general conformity SIP a state option.

F. Prior New Hampshire Conformity SIP Revision Action

On August 16, 1999 (64 FR 44417), EPA approved New Hampshire's Part Env-A 1502, Conformity of General Federal Actions. New Hampshire's rule references the Federal General Conformity rule (40 CFR 51, Subpart W).

G. State Submittal and EPA Evaluation

On December 9, 2011, the State of New Hampshire submitted a SIP revision consisting of additions and amendments to Env-A 1500, Conformity. The revised rule includes requirements for establishing a consultative process relative to transportation conformity determinations. Amendments to New Hampshire State Regulation Env-A 1500 were made to (1) clarify the rules by adding certain definitions, deleting definitions that are not needed, and revising existing provisions so they are more readily understandable; (2) updating the 40 Code of Federal Regulations (CFR) part 93 references and otherwise aligning the rules with current federal requirements; (3) removing the State requirement for a minimum 30-day public comment period for conformity determinations as this is not a federal requirement and establishing alternative, more appropriate timeframes through interagency consultative process; and (4)

consolidating provisions and definitions that are common to both transportation conformity and general conformity.

We have reviewed New Hampshire's submittal to assure consistency with the current Clean Air Act, as amended by SAFETEA-LU, and EPA regulations governing state procedures for transportation conformity and interagency consultation (40 CFR 93, Subpart A and 40 CFR 51.390) and have concluded that the submittal is approvable. Specifically, New Hampshire's rule at Env-A 1503 Transportation Conformity adequately addresses the three sections of the Federal transportation conformity rule discussed above (consultation procedures, written commitments for control measures and mitigation measures, and project sponsors compliance with such commitments). EPA notes that New Hampshire's conformity regulation at sections Env-A 1503.20 and 1503.21 require entities to obtain written commitments but does not explicitly require parties to comply with those commitments. However, as stated in 40 CFR 51.390(a), "The federal conformity regulations contained in part 93, subpart A, of this chapter would continue to apply for the portion of the requirements that the state did not include in its conformity implementation plan and the portion, if any of the state's conformity provisions that is not approved by EPA." Therefore, 40 CFR 93.122(a)(4)(i) and 93.125(b) which explicitly state that entities "must comply with the obligations of such commitments" would continue to apply and this omission in New Hampshire's rule is not an issue.

We also reviewed New Hampshire's submittal to assure consistency with the current Clean Air Act, as amended by SAFETEA-LU, and EPA regulations governing state procedures for general conformity (40 CFR 93, Subpart B and 40 CFR 51.851). New Hampshire's administrative rule Env-A 1504 Conformity of General Federal Actions, adequately refers to the general conformity Federal rule for implementation.

In addition, New Hampshire's December 9, 2011 SIP revision meets the requirements set forth in section 110 of the CAA with respect to adoption and submission of SIP revisions. As a result of this action, New Hampshire's previously SIP-approved general conformity procedures for New Hampshire Env-A 1502 (August 16, 1999; 64 FR 44417) will be replaced by Env-A 1500 the procedures submitted to EPA on December 9, 2011 for approval, and adopted by State of New Hampshire on September 11, 2011 with a State effective date of October 1, 2011. The approval of New Hampshire's conformity SIP revision will strengthen the New Hampshire SIP and will assist the state in complying with Federal NAAQS. Therefore, EPA is approving New Hampshire's revision to its conformity SIP to comply with the most recent Federal Conformity Requirements.

II. FINAL ACTION: EPA is approving New Hampshire's Env-A 1500 Conformity into the New Hampshire SIP.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this Federal Register publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective **[Insert date 60 days from date of publication in the Federal Register]** without further notice unless the Agency receives relevant adverse comments by **[Insert date 30 days from date of publication in the Federal Register]**.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on

the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on **[Insert date 60 days from date of publication in the Federal Register]** and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after

it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's Federal Register, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 8, 2013

Michael Kenyon,
Acting Regional Administrator,
EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart EE – New Hampshire

2. Section 52.1520 table in paragraph (c) is amended by revising the entry for “Env-A 1500” to read as follows:

§ 52.1520 Identification of plan.

* * * * *

(c) EPA approved regulations.

EPA Approved New Hampshire Regulations

State citation	Title/subject	State effective date	EPA approval date ¹	Explanations
*	*	*	*	*
Env-A 1500	Conformity	10/1/2011	[Insert date of <u>FR</u> publication] [Insert <u>Federal Register</u> page number where the document begins]	
*	*	*	*	*

¹ In order to determine the EPA effective date for a specific provision listed in this table, consult the Federal Register notice cited in this column for the particular provision.

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